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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JEROME SCALISE and ARTHUR RACHEL,

Petitioners,

vs.

RICHARD THORNBURGH and PHILIP T. WHITE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

I. Does the Attorney General have a mandatory duty to make regulations implementing a treaty concerning the transfer of citizens imprisoned in foreign countries where the treaty's enabling statute states that the Attorney General is authorized to make regulations and the pertinent legislative history demonstrates that the Attorney General was expected to enact regulations?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PRAYER

Petitioners Jerome Scalise ("Scalise") and Arthur Rachel ("Rachel") respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals reversing the district court's order granting summary judgment in the petitioners' favor is reported at 891 F.2d 640 and is attached hereto in Appendix A. The opinion of the district court, granting summary judgment, is reported at 687 F. Supp. 1239 and is attached hereto in Appendix B.

JURISDICTION

On December 19, 1990, the United States Court of Appeals for the Seventh Circuit reversed the district court's order granting summary judgment for the petitioners. This petition is filed within ninety days from the entry of that judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTE INVOLVED

18 U.S.C. § 4102 provides in pertinent part:

> The Attorney General is authorized—
>
> (1) to act on behalf of the United States as the authority referred to in the treaty;
>
> (2) to receive custody of offenders under a sentence of imprisonment, on parole, or on probation who are citizens or nationals of the United States transferred

from foreign countries and as appropriate confine them in penal or correctional institutions, or assign them to the parole or probation authorities for supervision;

* * *

(4) to make regulations for the proper implementation of such treaties in accordance with this chapter and to make regulations to implement this chapter.

STATEMENT OF THE CASE

In 1980, Petitioners Jerome Scalise and Arthur Rachel, citizens of the United States, traveled to London, England. While there, they allegedly committed an armed robbery of a jewelry store. It was alleged that they escaped with approximately $3.6 million in jewels, including the famous Marlborough Diamond. Scalise and Rachel were arrested and convicted in the Old Bailey for violations of the 1968 Theft Act of the United Kingdom and § 18(1) of the United Kingdom's Firearm's Act of 1968. The British judge imposed prison sentences of fifteen years on both Scalise and Rachel. Scalise and Rachel commenced service of their prison terms on August 6, 1984, and have been imprisoned across seas ever since.

On July 1, 1985, the United States, the United Kingdom and several other countries entered into a treaty known as the Convention on the Transfer of Sentenced Persons ("the Convention"). This treaty went into effect on August 1, 1985, and allows prisoners convicted abroad to serve their sentences in their home country. Treaties regarding international prisoner transfers serve salutary purposes.

As recognized in the recitation of the Convention's purpose:

> Considering that such cooperation should further the ends of justice and the social rehabilitation of sentenced persons; Considering that these objectives require that foreigners who are deprived of their liberty as a result of their commission of a criminal offence should be given the opportunity to serve their sentences within their own society; and Considering that this aim can best be achieved by having them transferred to their own countries. Have agreed as follows: . . .

Another important purpose of the prison transfer treaty is that transfers serve to ameliorate the grave hardships placed upon families of prisoners abroad. *See* Pisani & Simon, *The United States Treaties on Transfer of Prisoners: A Survey*, 17 PAC. L. J. 823, 829 (1986). The difficulties and hardships engendered when a loved one is incarcerated in a far-away land are self-evident and obviously provided an impetus for the present lawsuit.

The authority for impiementation of the Convention is vested in the Attorney General under the Transfer of Offenders To and From Foreign Countries Act. 18 U.S.C. § 4100 *et seq.* The pertinent portion of this act provides:

> The Attorney General is authorized—
>
> (1) to act on behalf of the United States as the authority referred to in the treaty;
>
> (2) to receive custody of offenders under a sentence of imprisonment, on parole, or on probation who are citizens or nationals of the United States transferred from foreign countries and as appropriate confine them in penal or correctional institutions, or assign them to the parole or probation authorities for supervision;
>
> * * *

> (4) to make regulations for the proper implementation of such treaties in accordance with this chapter and to make regulations to implement this chapter.

18 U.S.C. § 4102.

After enactment of the Convention, Scalise petitioned British and American authorities for a transfer. England agreed to transfer Scalise conditioned upon the United States' agreement. The Justice Department, acting on the Attorney General's behalf, refused to agree to the transfer, explaining in a letter to Scalise's counsel as follows:

> The principal factors we took into consideration in making the decision not to request Mr. Scalise's transfer were: the relative seriousness of his offense; his extensive criminal record; the manner of his return to the United Kingdom; his "A" security classification in the United Kingdom, the highest security category; and, the likelihood that a transfer would not further his rehabilitation.

Letter from Phillip T. White, Director of the Criminal Division of the Office of International Affairs of the Justice Department.

Thereafter, Scalise and Rachel filed a lawsuit in the Northern District of Illinois. The suit sought an order of mandamus against the Attorney General, demanding that he enact the regulations contemplated by 18 U.S.C. § 4102(4). The plaintiffs also sought an order, decreeing that the government, in refusing the transfer, had violated their right to due process.

Scalise and Rachel moved for summary judgment in the district court. The court granted the motion, finding that the Attorney General had a mandatory duty to promulgate regulations under 18 U.S.C. § 4102(4). *Scalise v. Meese*, 687 F. Supp. 1239 (N.D. Ill. 1988) (App. B). Ac-

cordingly, the court issued a writ of mandamus, compelling the Attorney General to enact such regulations. The court also ruled that it could review the transfer denial under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, and concluded that the denial constituted an abuse of discretion. The court further found that the plaintiffs had a liberty interest in the transfer process and deemed the letter denying the transfer request inadequate and in violation of the right to procedural due process.

The Attorney General appealed. The Seventh Circuit reversed, finding that § 4102(4) did not vest a mandatory duty in the Attorney General. *Scalise v. Thornburgh*, 891 F.2d 640 (7th Cir. 1989) (App. A). The Seventh Circuit also ruled that the district court lacked jurisdiction to review the Attorney General's denial of the transfer request. The court deduced that since the Attorney General had not promulgated guidelines, it had no meaningful standard against which to judge the agency's exercise of discretion, necessary for judicial review under the Administrative Procedure Act. The court also said that the plaintiffs did not have a liberty interest at stake. In this context, the court claimed that particularized standards guiding prison transfer decisions must be shown in order to create a liberty interest. The court reasoned that no liberty interest was present since the Attorney General was not required to (and did not) promulgate guidelines.

Scalise and Rachel now petition this Honorable Court to issue a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I.

THE SEVENTH CIRCUIT'S HOLDING THAT THE ATTORNEY GENERAL DOES NOT HAVE A DUTY TO ENACT REGULATIONS IMPLEMENTING THE TREATY REGARDING INTERNATIONAL PRISON TRANSFERS CONTRAVENES THE TREATY, THE POLICIES AND LEGISLATIVE INTENT UNDERLYING 18 U.S.C. § 4102(4) AND IS IN CONFLICT WITH OTHER DECISIONS ON MATTERS OF STATUTORY CONSTRUCTION.

All points raised in this case turn on whether the Attorney General has a duty to enact regulations implementing the treaty allowing for the transfer of prisoners between the United States and foreign countries. The pertinent statute provides that "[t]he Attorney General is authorized . . . to make regulations for the proper implementation of such treaties in accordance with this chapter and to make regulations to implement this chapter." 18 U.S.C. § 4102(4).[1] The Seventh Circuit ruled that this language did not require the Attorney General to enact regulations. *Scalise v. Thornburgh*, 891 F.2d 640, 644 (7th Cir. 1989). The court reasoned that "[t]he language does not provide that the Attorney General 'shall' issue regulations, it merely states that he is authorized to do so." *Id.*

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[1] This statute was passed in 1977, prior to the effective date of the Convention. There is no dispute that the act was designed to govern future treaties. *See* H. Rep. No. 95-720, 95th Cong., 1st Sess. *reprinted in* 1977 U.S. Code Cong. & Admin. News 3146, 3146.

In terms of statutory construction, resolution of whether a word suggests a mandatory or permissive duty does not necessarily depend upon the word itself. This Honorable Court has instructed that a word's normal mandatory or permissive meaning "can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure or purpose of the statute." *United States v. Rogers*, 461 U.S. 677, 706 (1983). Applying the *Rogers* test here, it is plain that the Attorney General *has* a mandatory duty to create regulations implementing the Convention. Accordingly, the decision of the Seventh Circuit is clearly erroneous and should be reviewed and reversed.

The legislative history of § 4102 demonstrates that the Attorney General was expected to implement regulations. The Committee Report of the House Judiciary Committee provides:

> *Standards for Attorney General Consent*
>
> Under existing treaties and this legislation the Attorney General must agree to the receipt or transfer of an offender. The committee was concerned that the Attorney General exercise his discretion on this point with care. In most cases, and possibly almost all cases, he should agree to any receipt or transfer, if the offender requests or voluntarily consents to such transfer. However they (sic) may be an unusual situation, involving possibly a dangerous offender, where the Attorney General should not agree to the return of the offender, and his immediate eligibility for parole, to United States. Similarly, there may be an unusual situation, involving an individual in American persons(sic), who for matters of future law enforcement, continuing investigation, or other national interests, should not be sent to his home country. *The committee therefore expects the Attorney General to promptly establish regulations and to provide stan-*

> *dards and guidelines which will govern the exercise of his discretion as to his consent to receive or transfer offenders.*

H. Rep. No. 95-720, 95th Cong., 1st Sess., *reprinted in* U.S. Code Cong. & Admin. News 3146, 3155 (emphasis added).

The Seventh Circuit blithely dismissed this clear statement indicating that the Attorney General has a mandatory duty to implement guidelines, stating that "[a]n expression of an 'expectation' by one committee of the House . . . does not establish congressional intent." *Scalise*, 891 F.2d at 645 [A8]. The lower court's dismissal of legislative history renders this case in patent conflict with prior decisions that have deemed committee reports strong evidence of congressional intent. *See Mills v. United States*, 713 F.2d 1249, 1252 (7th Cir. 1983); *Miller v. Federal Mine Safety and Health Review Commission*, 687 F.2d 194, 195 (7th Cir. 1982). *Accord National Association of Greeting Card Publishers v. United States Postal Service*, 462 U.S. 810, 822 (1983) (relying upon house report).[2]

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[2] The following statement of Representative Brown—not cited by the Seventh Circuit—provides even more support for the proposition that the Attorney General is obligated to make regulations:

> Certain questions have been raised about the treaty's potential for releasing serious offenders back on the streets. . . . It should be noted that, under this treaty the Attorney General must agree to the receipt or transfer of any offender. It has also been recommended that in certain situations, involving a dangerous offender, that the Attorney General should not agree to the return of that offender. *The Committee on the Judiciary expects that the Attorney General will promptly establish regulations and provide standards and guidelines which will govern the exercise of his discretion to receive or transfer offenders.*

123 Cong. Rec. 35, 022 (emphasis added).

In light of the foregoing legislative history, there is no escaping the conclusion that the Attorney General is required to enact guidelines implementing the Convention. Section 4102's use of the term "is authorized" does not emasculate or lessen the mandatory nature of this duty. The Seventh Circuit's holding to the contrary is clearly erroneous. And, in addition to the conflict manifested in the lower court's dismissal of the committee report, the decision below is in conflict with other decisions interpreting the word "authorized". Indeed, several other circuits have found that the term "authorized" creates a duty to act. *See Estate of Smith v. Heckler*, 747 F.2d 583 (10th Cir. 1984); *Abrams v. Hills*, 547 F.2d 1066 (9th Cir. 1976), *vacated*, 455 U.S. 1010 (1982); *U.S. Sugar Equalization Board v. P. De Ronde & Co.*, 7 F.2d 981 (3rd Cir. 1925); *Chase v. United States*, 261 F.2d 833 (8th Cir. 1919), *aff'd*, 256 U.S. 1 (1921). Likewise, several state courts have held that the term "authorized" can impose a mandatory duty to act. *See Catron v. Marron*, 19 N.M. 200, 142 P. 380 (1914); *Hotel Casey Co. v. Ross*, 343 Pa. 573, 23 A.2d 737 (1942); *Walsh v. Farrington*, 105 Vt. 269, 165 A. 914, 915 (1933).

The Seventh Circuit's interpretation of § 4102 violated another cardinal rule of statutory construction embraced by this Honorable Court. It has often been said that a statute must be interpreted so as to give effect to all of its terms and should not be interpreted so as to render some of its terms useless. *See Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307-08 (1961); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). By holding that the Attorney General need not promulgate regulations, the language of § 4102 plainly is rendered meaningless and ineffective.

In sum, the district court was wholly correct in issuing a mandamus directing the Attorney General to promulgate regulations. Looking to the legislative history, the statu-

tory language and the policies involved, it is plain that § 4102(4) imposes a mandatory duty upon the Attorney General to create regulations regarding international prison transfers. Furthermore, the Seventh Circuit's decision reversing the district court is erroneous and in conflict with other decisions, and directives from this Court.[3] Thus, this petition should be granted to remedy the injustice here.

CONCLUSION

WHEREFORE, Petitioners Jerome Scalise and Arthur Rachel respectfully pray that this Honorable Court grant this petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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[3] From a finding that the Attorney General has a duty to promulgate guidelines (and failed to do so) it follows, under the lower court's opinion, that a mandamus should issue given that the Attorney General would be in dereliction of a plainly defined and peremptory duty. *Scalise*, 891 F.2d at 647-48 [A13-14]. In addition, it also follows that the petitioners have a viable liberty interest at stake since the Attorney General's discretion would be limited by the regulations. *Id.* at 649 [A16-17].

APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-2497

JEROME J. SCALISE, et al.,

Plaintiffs-Appellees,

v.

RICHARD THORNBURGH, et al.,*

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 7898—**Brian Barnett Duff**, *Judge.*

ARGUED FEBRUARY 21, 1989—DECIDED DECEMBER 19, 1989

Before WOOD, JR., COFFEY, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* In this appeal, the Attorney General contests the district court's conclusion that § 4102(4) of the Transfer of Offenders To and From Foreign Countries Act, P.L. No. 95-144, 91 Stat. 1212, 18 U.S.C. §§ 4100 *et seq.* (1977) ("the Act"), requires him to issue substantive regulations governing his exercise of discretion in international prisoner transfer decisions. By virtue of this initial determination, the district court deemed it proper to exercise "mandamus jurisdiction" under 28

* Richard Thornburgh, Attorney General, is substituted for Edward Meese, III, former Attorney General, pursuant to Fed. R. App. P. 43(c)(1).

U.S.C. § 1361 compelling the Attorney General to promulgate such regulations. This initial determination also served to underpin the district court's exercise of jurisdiction under § 701(a)(2) of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. §§ 701 *et seq.* (1946), in reviewing the Attorney General's decision not to promulgate such regulations. Finally, the district court concluded that § 4102(4) of the Act raised a liberty interest under the due process clause that was violated in these proceedings by the Attorney General's denial of plaintiffs' transfer request. In that we conclude that the Attorney General is not required under § 4102(4) to issue substantive regulations governing his discretion in international prisoner transfer decisions, we reverse the district court's grant of summary judgment and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

Plaintiffs below, Jerome Scalise and Arthur Rachel, are United States citizens. In 1980, they committed an armed robbery of a jewelry store in London, escaping with jewels worth $3.6 million, including the famous Marlborough diamond. Scalise and Rachel were arrested and subsequently convicted in the United Kingdom of robbery and possession of a firearm with intent to commit an indictable offense in violation of the United Kingdom's 1968 Theft Act and Firearms Act of 1968.[1] Each was sentenced to 15 years in prison in the United Kingdom with the sentences to commence on August 6, 1984. Plaintiffs, however, do not wish to remain in England during their terms of incarceration.

On July 1, 1985, the United States and the United Kingdom ratified the Convention on the Transfer of Sentenced Persons ("the Convention"). This treaty provides for the transfer of foreign prisoners from the country of their in-

[1] Prior to their capture, however, Scalise and Rachel successfully arranged for the jewels to be mailed to the United States. To the best of this court's knowledge, these jewels have not yet been recovered by the British authorities.

carceration to their home countries. Under the Transfer of Offenders To and From Foreign Countries Act, the Attorney General is granted the authority to implement the Convention.[2] Specifically, under § 4102(4) of the Act, "[t]he Attorney General is authorized . . . to make regulations for the proper implementation of such treaties in accordance with this chapter and to make regulations to implement this chapter. . . ."

After the Convention went into effect, Scalise and Rachel sought transfer to the United States under its terms. The Attorney General refused to approve their request. In a letter to plaintiff's counsel, the Department of Justice, acting on behalf of the Attorney General, explained:

> The principal factors we took into consideration in making the decision not to request Mr. Scalise's transfer were: the relative seriousness of his offense; his extensive criminal record; the manner of his return to the United Kingdom; his "A" security classification in the United Kingdom, the highest security category; and, the likelihood that a transfer would not further his rehabilitation.

On September 11, 1988, Scalise and Rachel filed this action in federal district court seeking a writ of mandamus or, alternatively, a mandatory injunction to compel the Attorney General to seek their transfer and to issue substantive guidelines for his administration of the Convention. In a subsequent motion for summary judgment, Scalise and Rachel alleged that the Attorney General had breached a mandatory duty under § 4102(4) of the Act

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[2] Even though the Act was passed prior to the effective date of the Convention, all parties to this case agree that the provisions of the Act govern the Convention. *See* 18 U.S.C. § 1401(k) ("treaty" means a treaty under which an offender sentenced in the courts of one country may be transferred to the country of which he is a citizen or national for the purpose of serving the sentence); H. Rep. No. 95-720, 95th Cong., 1st Sess., *reprinted in* 1977 U.S. Code Cong. & Admin. News 3146, 3146 ("the purpose of the act is to provide the implementation procedures for offender transfer treaties with Mexico and Canada as well as for similar future treaties").

to publish regulations establishing standards for his review of prisoner transfer requests under international treaties. Scalise and Rachel further alleged that they had a liberty interest entitling them to due process in consideration of their transfer request and that the failure of the Attorney General to provide them with a hearing prior to denial of this request violated their fifth amendment rights.

The Attorney General argued that 18 U.S.C. § 4102(4) does not impose a mandatory duty to promulgate substantive regulations governing his exercise of discretion in prisoner transfer requests. The Attorney General argued further that the refusal to seek plaintiffs' transfers was reasonable in light of their lengthy criminal records involving violent crimes and their failure to cooperate in ongoing law-enforcement efforts to recover the stolen jewels. Finally, the Attorney General argued that the plaintiffs had no liberty interests in the transfer process entitling them to a hearing prior to denial of their requests for transfer.

The district court held that § 4102(4), viewed in light of its legislative history, does impose a mandatory duty upon the Attorney General to promulgate substantive regulations governing his exercise of discretion in considering prisoner transfer requests. Relying on this initial determination, the district court concluded that mandamus to compel the Attorney General to issue such regulations was appropriate under 18 U.S.C. § 1361. The district court also concluded that the Attorney General's denial of plaintiffs' transfer requests was subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("APA"), and that the denial in this case constituted an abuse of discretion. Finally, with regard to plaintiffs' procedural due process claims, the district court stated that a liberty interest arises whenever a statute or regulation places limits on the discretion of administrative officials with regard to transfer decisions. Relying on its earlier conclusion that § 4102(4) of the Act required the Attorney General to issue regulatory standards governing his review in prisoner transfer requests, the trial court held that Scalise and Rachel had a liberty interest in the transfer process which could be denied only through procedures

mandated by the due process clause. Concluding that the Attorney General's letter denying plaintiffs' transfer requests was an inadequate basis for review of that decision, the court held that due process required that they be given a more specific explanation of his decision and an opportunity to rebut.

II. DISCUSSION

In this appeal, the Attorney General contests each of the district court's findings. Most significant, however, is the appeal of the district court's initial determination that § 4102(4) of the Act compels the Attorney General to issue substantive regulations governing the exercise of his discretion in international prisoner transfer decisions. The Attorney General asserts that § 4102(4) does not impose such a mandatory obligation. Based on this position, the Attorney General claims that the district court's exercise of mandamus jurisdiction under 28 U.S.C. § 1361 was not warranted under this court's precedent. The Attorney General further argues that § 701(a)(2) of the APA precludes judicial review of his decision in that his determination is committed to agency discretion by law.[3] Finally,

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[3] Although this argument was not raised at the district court level, we conclude that the Attorney General may raise this jurisdictional issue in this appeal. The Attorney General's argument under APA § 701(a)(2) is "jurisdictional" in both its content and its potential impact. As such, our consideration of this argument is in line with the "jurisdictional question" exception to the general rule that an issue not raised in the trial court cannot be raised for the first time on appeal. *See Boyers v. Texaco Refining & Mktg., Inc.*, 848 F.2d 809, 811-12 (7th Cir. 1988); *Johnson v. Artim Transp. System, Inc.*, 826 F.2d 538, 548 (7th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 1998 (1988), *reh'g denied*, ___ U.S. ___, 108 S. Ct. 2919 (1988); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1333 (7th Cir.), *cert. denied*, 434 U.S. 975, 98 S. Ct. 533 (1977); *see also Hormel v. Helvering*, 312 U.S. 552, 556-57, 61 S. Ct. 719, 721 (1940) (There may be exceptional circumstances that will prompt a reviewing or appellate court to consider questions of law which were neither pressed or passed upon by the court below).

the Attorney General argues that the district court erred in finding that plaintiffs had a liberty interest entitling them to due process in consideration of their transfer requests.

Mandatory Duty to Issue Regulations Under § 4102(4)

In determining whether § 4102(4) imposes a mandatory obligation to issue substantive regulations governing the Attorney General's exercise of discretion, our task is one of determining the congressional intent. *United States v. Markgraf*, 736 F.2d 1179 (7th Cir. 1984), *cert. dismissed*, 469 U.S. 1199, 105 S. Ct. 1154 (1985). In making this determination, we have stated that courts should consider "the language of the statute; the legislative history; and the interpretation given by the administrative agency charged with enforcing the statute." *Id.* at 1182 (citations omitted). Accordingly, we will proceed in that order.

Section 4102(4) of the Act, provides that "[t]he Attorney General *is authorized* . . . to make regulations for the proper implementation of such treaties in accordance with this chapter and to make regulations to implement this chapter." (emphasis added). We find no merit in the argument that this language by itself imposes a mandatory duty to issue regulations. The language does not provide that the Attorney General "shall" issue regulations, it merely states that he is authorized to do so.[4] Thus, if a

[4] We do not intend to sound pedantic in pointing out this distinction. Congress unquestionably knows how to and is capable of imposing mandatory obligations on Executive branch officials to issue regulations. *See, e.g.*, The Clean Air Amendments of 1970, 42 U.S.C. §§ 7403 *et seq.*, Pub. L. No. 91-604, § 109, 84 Stat. 1676, 1679 (1970):

> (a)(1) The Administrator—
>
> (A) within 30 days after the date of enactment of the Clean Air Amendments of 1970, *shall publish* proposed regulations . . . ." (emphasis added).

mandatory duty is to be found in this section, it must arise from the legislative history.[5]

The district court's determination that the Attorney General is mandated to issue regulations was based primarily on the language of the Committee Report of the House Judiciary Committee, H. Rep. No. 95-720, 95th Cong., 1st Sess., *reprinted in* 1977 U.S. Code Cong. and Admin. News 3146, 3155.[6] This Committee Report expresses an "expectation" that the Attorney General will issue sub-

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[5] Under Seventh Circuit precedent, it is proper for a court to look beyond the express language of a statute in order to give force to congressional intent only in those situations where the statutory language is ambiguous, or where a literal interpretation of the statutory language would thwart the overall purpose of the statutory scheme. *United States v. Stewart*, 865 F.2d 115, 116 (7th Cir. 1988) (quoting *United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1313 (7th Cir. 1978)). Just as we conclude that this statutory language does not impose a mandatory obligation to issue regulations, we also believe that the context in which this language is stated does not clearly imply that it is permissive. Thus, the "ambiguous" nature of the statutory language permits us to examine the legislative history to determine congressional intent.

[6] This Report provides in part:

> Under existing treaties and this legislation, the Attorney General must agree to the receipt or transfer of an offender. The committee was concerned that the Attorney General exercise his discretion on this consent with care. In most cases, and possibly almost all cases, he should agree to any receipt or transfer, if the offender requests or voluntarily consents to such transfer. However, they [sic] may be an unusual situation, involving possibly a dangerous offender, where the Attorney General should not agree to the return of the offender, and his immediate eligibility for parole, to the United States. Similarly, there may be an unusual situation, involving an individual in American persons [sic], who for matters of future law enforcement, continuing investigation, or other national interests, should not be sent to his home country. The committee therefore expects the Attorney General to promptly establish regulations and to provide standards and guidelines which will govern the exercise of his discretion as to his consent to receive or transfer offenders.

stantive regulations. An expression of an "expectation" by one committee of the House, however, does not establish congressional intent. As the Supreme Court stated in *Pierce v. Underwood*, ___ U.S. ___, ___, 108 S. Ct. 2541, 2551 (1988), "it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means." *See also International Brotherhood of Electrical Workers Local Union No. 474 v. NLRB*, 814 F.2d 697, 712 (D.C. Cir. 1987) (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1054 n. 11 (D.C. Cir. 1986), *aff'd* 484 U.S. 1, 108 S. Ct. 252 (1987).[7] While we recognize that statements made in committee reports are generally regarded as indicia of legislative purpose, *see, e.g., Mills v. United States*, 713 F.2d 1249 (7th Cir. 1983), *cert. denied*, 464 U.S. 1069, 104 S. Ct. 974 (1984); *Miller v. Federal Mine Safety and Health Review Comm'n*, 687 F.2d 194 (7th Cir. 1982), the unique nature of international prisoner transfer decisions and the absence of any indication of an obligation in both the Senate Report and the statutorily enacted language leads us to reject this "expectation" as expressed in the House Committee Report as dispositive.

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[7] Our reluctance to adopt as dispositive this language from the House Committee Report is premised not only on the lack of support which this "expectation" receives in either the Senate Report, *see* S. Rep. No. 95-435, 95th Cong., 1st Sess., or the statutory language as it was finally enacted, but also from the contradictory nature of the legislative history itself. The uncertain nature of the legislative history is evidenced by the statements of Rep. Eilberg, the sponsor of the bill, during floor debates on the date of passage in the House. Responding to concerns expressed by Rep. Kazen, Rep. Eilberg emphasized the discretion to be accorded the Attorney General under the provisions of this Act:

> [A prisoner] is not automatically entitled to be exchanged to the United States after conviction and sentence. It would require the discretionary consent of [the foreign government] and the discretionary consent of our our [sic] Government, as exercised here by the Attorney General. . . . *The Attorney General would exercise his discretion as he deems reasonable.* (emphasis added).

The Act simply authorizes the Attorney General to issue regulations; it does not, however, provide substantive guidelines by which the Attorney General should exercise his discretion. Nor does the Act provide guidance in the issuance of such regulations should the Attorney General choose to issue regulations.[8] This fact is important in our survey of congressional intent in that this discretion which Congress has bestowed upon the Attorney General in carrying out his duties under the Act is reasonable in light of the unique nature of prisoner transfer decisions. This court has recognized in *Shango v. Jurich*, 681 F.2d 1091 (7th Cir. 1982), that prisoner transfer decisions are unique in that they turn on an assessment of a variety of considerations. As we stated, "interprison transfers obviously are not 'mindless events;' rather '[t]ransfers between institutions . . . are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate.' " *Id.* at 1102 (quoting *Meachum v. Fano*, 427 U.S. 215, 226, 96 S. Ct. 2532, 2540 (1976)). Although our decision in *Shango* revolved around intrastate transfer decisions made by state prison officials, we believe that in interprison transfer decisions, whether they be international or intrastate, the decisionmaking authority necessarily considers many of the same penological considerations. In this regard, we are not unmindful of the fact that a salutary purpose of the Convention is to further the social rehabilitation of international prisoners by providing for their transfer to their home countries. Contrary to plaintiffs' arguments in this appeal, however, we do not believe that our construction of § 4102(4) necessarily frustrates this purpose. Moreover, we are reluctant to put the cart before the horse in ruling that the achievement

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[8] The Attorney General has published regulations governing the procedural mechanics of prisoner transfers in accordance with the discretion granted to him in § 4102(4) of the Act. *See* 28 C.F.R. §§ 527.40 *et seq.*, 28 C.F.R. § 0.64-2 plus Appendix, and 28 C.F.R. § 0.96b.

of this purpose should override the assessment of the necessary penal considerations which entered into the Attorney General's decision in this case.

The record indicates that such a discretionary assessment of various considerations was undertaken by the Attorney General in denying plaintiffs' requests. In a letter to Plaintiff's counsel, the Department of Justice, acting on behalf of the Attorney General, recited the principal factors it took into consideration in deciding not to re quest Mr. Scalise's transfer. The Attorney General highlighted the relative seriousness of his offense; his extensive criminal record; the manner of his return to the United Kingdom; his "A" security classification in the United Kingdom, the highest security category; and, the likelihood that a transfer would not further his rehabilitation. (Appellant's Separate App. p. 41). While these considerations may not appease those most intimately concerned, it is not our job to second guess the Attorney General's weighing of these considerations in his decision-making process. As we recognized in *Shango*, "[s]uch discretionary decisions are the business of penologists and 'are not the business of federal judges.' " *Id.* at 1102 (quoting *Meachum*, 427 U.S. at 229, 96 S. Ct. at 2540).

In reaching our conclusion, we note that our construction of § 4102(4) is consistent with constructions given to other similar statutes by both this court and the United States Supreme Court. In *Heckler v. Chaney*, 470 U.S. 821, 105 S. Ct. 1649 (1985), the Court was asked to review a decision on the part of the Food and Drug Administration ("FDA") not to take enforcement actions to prevent alleged violations of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended, 21 U.S.C. §§ 301 *et seq.* ("FDCA"). Section 372 of the FDCA, the specific enforcement provision in question, provided that "the Secretary *is authorized* to conduct examinations and investigations for the purposes of this Act . . . ." (emphasis added). Although the specific issue presented to the Court was the reviewability of the FDA's decision under

§ 701(a)(2), it is noteworthy that the Court's ultimate conclusion that the FDA decision was not reviewable was premised on the underlying determination that the language of § 372 was permissive and not mandatory in nature.

Likewise, in *Arnow v. United States Nuclear Regulatory Comm'n*, 868 F.2d 223 (7th Cir.), *cert. denied sub nom., Citizens of Illinois v. United States Nuclear Regulatory Comm'n*, ____ U.S. ____, 110 S. Ct. 61 (1989), this court interpreted language similar to that contained in § 4102(4) of the Act as permissive and not mandatory. The dispute in *Arnow* arose under the Nuclear Regulatory Commission's interpretation of their obligation to issue orders under the Atomic Energy Act, 42 U.S.C. §§ 2011 *et seq.* ("AEA"). Section 2201(c), the specific provision of the AEA in question, "authorizes" the NRC to "make such studies and investigations . . . as the Commission may deem necessary or proper to assist it in [the] . . . enforcement of this chapter." Again, while the specific issue presented to this court dealt with the reviewability of the Commission's final decision denying petitioner's request for an issuance of an order, it is instructive that the language of § 2201(c) was construed as bestowing discretion upon the NRC in its enforcement of the AEA's provisions.[9]

Finally, in *Markgraf*, this court was asked to rule on the nature of the Secretary of Agriculture's duties under the Agricultural Act of 1961, 7 U.S.C. § 1981a (1982). This section provides that, "the Secretary may permit . . . the deferral of principal and interest on any outstanding loan . . . and may forego foreclosure of any such loan . . . ." Plaintiffs sought to compel the Secretary of Agriculture to implement § 1981a. Plaintiffs also sought to compel the Secretary to promulgate regulations providing procedural

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[9] In dicta, this court further implied that the language in 42 U.S.C. § 2201(p) which provides that the NRC is "authorized . . . to make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this Chapter" was permissive in nature.

and substantive guidelines governing the Secretary's decisions whether or not to grant relief in individual cases. This court held that the Secretary does have a mandatory duty to "implement" this Act. This conclusion, we held, was supported both by inferences drawn from the statutory language and the legislative history underlying the Act's passage. Of greater importance for the present circumstances, however, was our conclusion that the Secretary was not under any obligation to promulgate substantive regulations governing his exercise of discretion under § 1981a. This latter determination was premised in part on the fact that, although the House version of § 1981a expressly provided for "regulations prescribed by the Secretary", the final version of the bill as enacted by Congress did not make reference to such "regulations". We stated that "[t]his deletion of the express requirement of regulations, although not conclusive, indicates that Congress did not intend to mandate that the Secretary act through regulations." *Markgraf*, 736 F.2d at 1185. Applying this same reasoning to the issue presented to the court today, we conclude that Congress did not intend § 4102(4) to impose a mandatory obligation on the Attorney General to issue substantive regulations in the exercise of his discretion in prisoner transfer decisions.

As pointed out earlier, a final factor to be considered in determining congressional intent is the interpretation given to the statute by the agency charged with enforcing the statutory provision. As we stated in *Markgraf*, "[i]t is a well-established maxim that courts will give substantial deference to an agency's interpretation of a statute that it is charged with enforcing." *Id.* at 1183. There can be no question as to how this consideration cuts under the present circumstances. The Attorney General's fundamental premise underlying all issues in this appeal is that § 4102(4) does not impose a mandatory obligation to issue substantive regulations governing his exercise of discretion in prisoner transfer decisions.

In sum, based on the statutory language, the lack of any dispositive evidence in the legislative history, the

unique nature of prisoner transfer decisions, and the deference owed to the Attorney General's interpretation of this statutory provision, we conclude that § 4102(4) does not impose a mandatory obligation on the Attorney General to issue substantive regulations. Having so determined, we proceed to review the propriety of the district court's issuance of the writ of mandamus, the district court's review of the Attorney General's denial of plaintiffs' transfer requests, and the conclusion that § 4102(4) creates a liberty interest that was violated by the Attorney General under these facts.

Writ of Mandamus

Relying on the authority apparently granted by 28 U.S.C. § 1361, the district court below issued a writ of mandamus ordering the Attorney General to promulgate regulations to govern requests from American citizens incarcerated abroad for transfer to American prisons. The Attorney General argues that this action on the part of the district court was without foundation under the terms of 18 U.S.C. § 4102(4). By virtue of our conclusion that § 4102(4) does not impose a mandatory obligation on the Attorney General, we agree with the Attorney General and hold that the issuance of a writ of mandamus under this section was not warranted.

Under 28 U.S.C. § 1361, the "district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." This grant of jurisdiction, however, has been substantially limited in scope under the decisions of this court. Specifically, this circuit has recognized that mandamus is an "extraordinary remedy" and, as such, may be invoked only when there is:

(1) a clear right in the plaintiff to the relief sought;

(2) a plainly defined and peremptory duty on the part of the defendant to do the act in question;

(3) no other adequate remedy available.

Burnett v. Bowen, 830 F.2d 731, 739 (7th Cir. 1987) (quoting *Homewood Professional Healthcare Center, Ltd. v. Heckler*, 764 F.2d 1242, 1251 (7th Cir. 1985)); *see also Save the Dunes Council v. Alexander*, 584 F.2d 158, 162 (7th Cir. 1978) (It is manifest that the judiciary cannot compel through a writ of mandamus a federal official to perform any function unless the official is clearly directed by law to perform such a duty). The statutory provision at issue in this appeal, 18 U.S.C. § 4102(4), does not satisfy these jurisdictional prerequisites.

Under this section, the Attorney General does not have a "plainly defined and peremptory duty" to issue substantive regulations governing his exercise of discretion. As we concluded above, § 4102(4) does not impose such an obligation, but rather leaves this to the discretion of the Attorney General. In the absence of such an obligation under § 4102(4), the district court's exercise of mandamus jurisdiction under § 1361 was not warranted under this court's precedent and the writ should be vacated.

Review of Attorney General's Discretion Under § 701(a)(2)

The Administrative Procedure Act provides generally for judicial review of final agency action when a person has suffered legal wrong as a result of an agency action. 5 U.S.C. § 702. Under § 701(a)(2), however, judicial review is not to be had if the "agency action is committed to agency discretion by law." The Attorney General's claim that the district court was without jurisdiction to review his denial of plaintiffs' transfer requests is based on this statutory exception and the interpretation given to § 701(a)(2) by both this court and the United States Supreme Court.

In *Webster v. Doe*, 486 U.S. 592, 108 S. Ct. 2047 (1988), the Court stated, with regard to § 701(a)(2), that "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at ____, 108 S. Ct. at 2052 (quoting *Heckler*, 470 U.S. at 830, 105 S. Ct. at 1655). This interpretation of the language of § 701(a)(2)

was expressly relied upon by this court in *Arnow*, wherein we held that we did not have jurisdiction to review a decision of the Nuclear Regulatory Commission denying a request from Illinois citizens for the issuance of an order. 868 F.2d at 234; *see also Singh v. Moyer*, 867 F.2d 1035, 1037-38 (7th Cir. 1989) (In determining whether there is a meaningful standard for purposes of review under § 701(a)(2), this court looks to: the statutory language, the statutory structure, the legislative history, and the nature of the agency action). The same principle that governed our determination in those cases governs our decision here.

In all of these cases, judicial review of the agency decision was precluded by virtue of the fact that the reviewing court would have no law to apply under the statute in question by which to review the action undertaken by the agency. The language of § 4102(4) is substantially similar to those discussed in *Webster*, *Heckler* and *Arnow*. Section 4102(4) provides that "[t]he Attorney General is authorized . . . to make regulations for the proper implementation of such treaties . . . ." This language, by itself, certainly does not provide the reviewing courts with any guidance. Furthermore, no other provisions of the Act provide for any standards by which the Attorney General could measure his conduct in exercising his authority under § 4102(4). In the absence of any standards upon which this court could review the Attorney General's discretionary authority, and in light of our earlier determination that § 4102(4) does not impose a mandatory obligation to issue such substantive regulations, we conclude that Congress has provided no "meaningful standard" for reviewing the Attorney General's conduct and, as such, has committed these determinations to the Attorney General's discretion. Accordingly, we hold that the district court did not have jurisdiction under § 701(a)(2) to review the Attorney General's denial of plaintiffs' requests.

Liberty Interest

The district court's determination that the provisions of the Act create a liberty interest under the due proc-

ess clause of the fifth amendment in favor of those prisoners seeking an international transfer was premised, in large part, on the Supreme Court's reasoning in *Olim v. Wakinekona*, 461 U.S. 238, 103 S. Ct. 1741 (1983). In *Olim*, an interstate prisoner transfer case, the Court stated that a liberty interest would be implicated in prisoner transfer decisions where the statute or administrative regulation places substantive limitations on the discretion of the administrative officials. *Id.* at 249, 103 S. Ct. at 1747; *see also Meachum*, 427 U.S. at 228, 96 S. Ct at 2540; *Montanye v. Haymes*, 427 U.S. 236, 243, 96 S. Ct. 2543, 2547 (1976).[10] Applying this rationale to its earlier conclusion that § 4102(4) does impose a mandatory obligation on the Attorney General to issue substantive regulations governing his exercise of discretion, the district court concluded that plaintiffs' due process rights were implicated and that the Attorney General's actions in this case did not protect the due process rights to which the plaintiffs were allegedly entitled.

As the Court stated in *Olim*, however, before a protected liberty interest can be said to have been created, "an inmate must show 'that particularized standards or criteria guide the State's decisionmakers.' " 461 U.S. at 249, 103 S. Ct. at 1747 (quoting *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467, 101 S. Ct. 2460, 2465 (1981) (Brennan, J., concurring); *see also Campbell v. Miller*, 787 F.2d 217, 223 (7th Cir.), *cert. denied*, 479 U.S. 1019, 107 S. Ct. 673 (1988). This standard has most recently been reiterated by the Court in *Kentucky Dep't of Corrections v. Thompson*, ____ U.S. ____, 109 S. Ct. 1904 (1989). In *Thompson*, the Court held that prisoners

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[10] Like the district court below, we have found no authority on the liberty interests, if any, of American citizens imprisoned in foreign countries who seek international prison transfers. We believe, however, that there is no reason to treat these prisoners seeking international prison transfers differently from American prisoners who claim a due process right to be, or not to be, transferred interstate from prison to prison.

could not establish a liberty interest in receiving certain visitors without first showing that the regulations in question contained "specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow. . . ." *Id.* at ____, 109 S. Ct. at 1910. We have already concluded that the Attorney General is not obligated under § 4102(4) of the Act to issue substantive regulations governing his exercise of discretion. Further, under the standard set forth in *Thompson*, plaintiffs cannot point to any language in the Act that would support an assertion that their transfer was required upon the satisfaction of certain "substantive predicates." As such, plaintiffs have failed to show the "particularized standards or criteria" necessary to establish the existence of a liberty interest in this context. Accordingly, we reverse the district court's determination that § 4102(4) raises a liberty interest in prisoners seeking international prison transfers.[11]

For the foregoing reasons, the decision of the district court granting plaintiffs' motion for summary judgment is reversed and remanded for proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[11] We need not address the propriety of the Attorney General's actions under a due process analysis since we find that § 4102(4) does not raise a due process right.

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 19, 1989.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

JEROME J. SCALISE and ARTHUR RACHEL,
Plaintiffs-Appellees,

No. 88-2497 vs.

RICHARD THORNBERG, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 7898—**Brian Barnett Duff,** Judge.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED and REMANDED, with costs, in accordance with the opinion of this court filed this date.

APPENDIX B

[687 F.Supp. 1239]

Joseph Jerome SCALISE, et al., Plaintiffs,

v.

Edwin MEESE III, Attorney General of the United States, et al., Defendants.

No. 87 C 7898.

United States District Court, N.D. Illinois, E.D.

June 3, 1988.

* * * * *

MEMORANDUM OPINION

BRIAN BARNETT DUFF, District Judge.

Plaintiffs Joseph Scalise and Arthur Rachel are in a jail in a land far, far away. They want to come home. The Attorney General of the United States has the power to grant their wish, but he refuses to exercise it. Plaintiffs seek a writ of mandamus ordering the Attorney General to establish regulations which would govern the grant or denial of their request, as well as an order finding the Attorney General's refusal a violation of their due process rights. They have moved for summary judgment on their complaint. This court has jurisdiction under both the general federal subject matter jurisdiction statute, 28 U.S.C. § 1331, and the federal mandamus statute, 28

U.S.C. § 1361.[1] For the reasons set forth below, plaintiffs' motion will be granted and the writ of mandamus will issue.

BACKGROUND

Five years ago, plaintiffs, citizens of the United States, went to London, England for a trip. While they were there, they armed themselves with a firearm and robbed a jewelry store. They escaped with around $3.6 million dollars in jewels, including the famous Marlborough Diamond.

They did not remain free long. The British authorities soon caught up with them, though not with the stolen jewels. Plaintiffs were tried and convicted in the Old Bailey for violations of the 1968 Theft Act of the United Kingdom and § 18(1) of the United Kingdom's Firearm's Act of 1968. The British judge sentenced them to fifteen years in prison, with their terms of imprisonment commencing August 6, 1984.

Under British law, plaintiffs will be eligible for release in July, 1993, although they will apparently be eligible for "parole license", a term with which this court is not familiar, in July of this year.

In any case, plaintiffs do not wish to remain in England. Beginning shortly after their incarceration, they began inquiring into the possibility of their being transferred to

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[1] 28 U.S.C. § 1361 provides:

> The district court shall have original jurisdiction over any action in the nature of mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty owed to plaintiff.

the United States to serve out their sentences. On July 1, 1985, the United States and the United Kingdom, in conjunction with a number of other countries, ratified the Convention on the Transfer of Sentenced Persons ("the Convention"). This treaty, which went into effect August 1 of that year, provides for the transfer of foreign prisoners from the country of their incarceration to their home countries.

In the United States, authority for the implementation of the Convention is vested with the Attorney General under the Transfer of Offenders To and From Foreign Countries Act ("the Act"), P.L. No. 95-144, 91 Stat. 1212, 18 U.S.C. § 4100 et seq.[2] The Act provides, in pertinent part:

> Section 4102. *Authority of the Attorney General*
>
> The Attorney General is authorized—
>
> (1) to act on behalf of the United States as the authority referred to in the treaty;
>
> (2) to receive custody of offenders under a sentence of imprisonment, on parole, or on probation who are citizens or nationals of the United States transferred from foreign countries and as appropriate confine them in penal or correctional institutions, or assign them to the parole or probation authorities for supervision;
>
> . . . . .

[2] Although the Act was passed and went into effect in 1977, all parties to this case agree that the Act governs the Convention. *See* 18 U.S.C. § 4101 ("(k) 'treaty' means a treaty under which a foreign offender sentenced in the courts of one country may be transferred to the country of which he is a citizen or national for the purposes of serving the sentence."); H.Rep. No. 95-720, 95th Cong., 1st Sess., *reprinted in* 1977 U.S.Code Cong. & Admin.News 3146, 3146 ("The purpose of [the Act] is to provide the implementation procedures for offender transfer treaties with Mexico and Canada *as well as for similar future treaties*.") (Emphasis added).

> (4) to make regulations for the proper implementation of such treaties in accordance with this chapter and to make regulations to implement this chapter . . .

After the Convention went into effect, plaintiffs wrote letters to both the British and the American authorities requesting transfer to American prisons. The British authorities told them that England would agree to their transfer, provided that the United States did likewise. The Justice Department, acting on behalf of the Attorney General, however, declined their request. In a letter from Phillip T. White, Director of the Criminal Division of the Office of International Affairs of the Justice Department, to Anne M. Burke, attorney for Plaintiff Joseph Scalise, the Justice Department explained its decision:

> This is in reply to your letter of August 29, 1986. The principal factors we took into consideration in making the decision not to request Mr. Scalise's transfer were: the relative seriousness of his offense; his extensive criminal record; the manner of his return to the United Kingdom; his "A" security classification in the United Kingdom, the highest security category; and, the likelihood that a transfer would not further his rehabilitation.

Plaintiffs contend that the Attorney General has violated the Act and the Due Process Clause by failing to promulgate regulations and guidelines governing requests for transfer under the Convention, and by refusing to give them a hearing on their requests.

The Attorney General, in turn, contends that the Act does not require him to promulgate regulations or guidelines, and that he may deal with such requests on an ad hoc basis pursuant to internal (and undisclosed) criteria.

He insists that his decision in this case was well within the permissible discretion granted to him by the Act. The Attorney General also argues that the Convention and the Act create no legitimate expectations for American prisoners incarcerated abroad and, accordingly, that his refusal to provide plaintiffs a bearing on their requests cannot violate the Due Process Clause.

What the Attorney General does not do, however, is to provide this court with any evidentiary material to oppose plaintiffs' summary judgment motion. The Attorney General states: that plaintiffs mailed the stolen jewels to American before they were caught and that the British authorities are continuing their investigation to locate the jewels; that plaintiffs have extensive criminal histories; that they have demonstrated no remorse for their conduct; that they would be immediately eligible for parole if they were transferred to this country; and that they would be a threat to their communities. Yet, he presents not a single shred of evidence to support these factual assertions. Such unsupported assertions are inadequate in a motion for summary judgment, and therefore will not be considered by this court in its resolution of the motion.[3]

DISCUSSION

Plaintiffs' complaint and motion for summary judgment can best be divided into three parts. The first part seeks a writ of mandamus ordering the Attorney General to promulgate regulations and guidelines as allegedly required by the Act. The second asks this court to review and reverse the Attorney General's administrative decision to

[3] The court notes that the Attorney General did not indicate that it needed more time before responding to plaintiffs' motion.

deny their transfer requests. The third seeks a declaration that the Attorney General has violated their due process rights, and an order granting them an administrative hearing on their request.

The Writ of Mandamus

For a court to grant a writ of mandamus, or to grant relief in the nature of the writ,[4] against an executive agency is an extraordinary step.

> In this circuit, it it well-established that mandamus jurisdiction may only be invoked when the following three elements are present:
>
> "(1) a clear right in the plaintiff to the relief sought;
>
> (2) a plainly defined and peremptory duty on the part of the defendant to do the act in question;
>
> (3) no other adequate remedy available."

Homewood Professional Care Center, Ltd. v. Heckler, 764 F.2d 1242, 1251 (7th Cir. 1985) (quoting *Americana Healthcare Corp. v. Schweiker*, 688 F.2d 1072, 1084 (7th

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[4] Section 10 of the Administrative Procedure Act, 5 U.S.C. § 706 provides in part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed. . . .

Like the traditional writ of mandamus, this provision may be invoked to compel agency action when the requirements for the common law writ have been satisfied. *See Conservation Law Foundation of New England, Inc. v. Clark*, 590 F.Supp. 1467 (D.C. Mass.1984).

Cir.), *cert. denied*, 459 U.S. 1202, 103 S.Ct. 1187, 75 L.Ed.2d 434 (1982)); *Beckless v. Heckler*, 622 F.Supp. 715, 720 (D.C.Ill.1985). These elements are addressed in turn.

1. Plaintiffs' Rights

Although the Attorney General asserts that plaintiff is not entitled to mandamus because the Act does not impose a duty on the Attorney General to promulgate regulations, the Attorney General does not argue that, if such a duty exists, plaintiffs lack the right to enforce it. This court agrees with the Attorney General's implied concession that the Act gives plaintiff a private right to enforce the terms of both the Act and the Convention. *See, e.g.*, Letter of Submittal from Secretary of State to President, Recommending Transmittal of the Convention to the Senate, April 30, 1984 at 3 ("The purpose of the Convention is to facilitate the transfer of foreign prisoners to their home countries by establishing procedures that can be initiated *by prisoners* who prefer to serve their sentences there.") (emphasis added), adopted in Letter of Transmittal from President to Senate Recommending Ratification, May 7, 1984; *Id.* at 6 ("[The Convention] is fully consistent with the provisions of Public Law 95-144, 18 U.S.C. sec. 4100 *et seq.*, enacted by Congress to implement treaties relating to the transfer of offenders to or from foreign countries. No new legislation would be required."); H.Rep. No. 95-720, 95th Cong., 1st Sess., *reprinted in* 1977 U.S.Code Cong. & Admin.News 3146, 3155 (Congress intends that the Attorney General will, in most cases, consent to the receipt of Americans from abroad pursuant to the Act "if the offender requests . . . such transfer"); *see also Pfeiffer v. United States Bureau of Prisons*, 615 F.2d 873, 876 (9th Cir.1980) ("[The] sole purpose of the treaty on the Execution of Penal Sentences [between the

United States and Mexico] is to permit persons convicted in foreign countries to serve their incarcerations in the country of which they are citizens."). Thus, if the Act imposes a duty on the Attorney General to promulgate regulations, plaintiffs are entitled to compel him to abide by it.

2. The Attorney General's Duty

In determining whether the Act imposes on the Attorney General "a plainly defined and peremptory duty" to promulgate regulations and guidelines for the transfer of prisoners, this court's only function is to give effect to Congress' intent. *United States v. Markgraf,* 736 F.2d 1179, 1182 (7th Cir.1984), *cert. denied,* 469 U.S. 1199, 105 S.Ct. 1154, 84 L.Ed.2d 308 (1985). The Seventh Circuit has explained how the court must approach its task:

> In determining [Congress'] intent, courts customarily look to several factors: the language of the statute; the legislative history; and the interpretation given by the administrative agency charged with enforcing the statute.

Id. at 1182.

As set forth above, the statute provides that the Attorney General "is authorized . . . to make regulations for the proper implementation of such treaties in accordance with this chapter and to make regulations to implement this chapter." 18 U.S.C. § 4102. Whether this language mandates the promulgation of such regulations, or merely permits it, is not clear. *Cf. Abrams v. Hill,* 547 F.2d 1062 (9th Cir.1976) (just because statute states that government officer "is authorized" to take certain actions does not necessarily mean that the officer has discretion to refuse to act), *cited with approval, United States*

v. Markgraf, 736 F.2d 1179 (7th Cir.1984) (statute stating that Secretary of Agriculture "may permit" the deferral of certain loans did not give Secretary the authority to refuse to implement the statute, but gave him the discretion to deny deferral to some borrowers). Thus, this court must look to the Act's legislative history.

Doing so clarifies the picture. The House Report adopted as the official legislative history of the Act provides, in pertinent part, as follows:

> Section 4102. *Authority of the Attorney General.*
>
> This section designates the Attorney General as the "authority" referred to in the treaties and gives him the necessary authority to implement the treaties with regard to receiving American offenders from a foreign country who are serving a sentence of imprisonment, or who are on probation or parole. It also authorizes the Attorney General to transfer Federal offenders who are serving a sentence of imprisonment, or who are on probation or parole, to the country of which they are citizens or nationals.
>
> *Standards for Attorney General Consent*
>
> Under existing treaties and this legislation, the Attorney General must agree to the receipt or transfer of an offender. The committee was concerned that the Attorney General exercise his discretion on this concern with care. *In most cases, and possibly almost all cases, he should agree to any receipt or transfer,* if the offender requests or voluntarily consents to such transfer. However, they [sic] may be an unusual situation, involving possibly a dangerous offender, where the Attorney General should not agree to the return of the offender, and his immediate eligibility for parole, to the United States. Similarly, there may be an unusual situation, involving an individual in

> American persons [sic], who for matters of future law enforcement, continuing investigation, or other national interests, should not be sent to his home country. *The committee therefore expects the Attorney General to promptly establish regulations and to provide standards and guidelines which will govern the exercise of his consent as to his consent to receive or transfer offenders.*

H.Rep. No. 95-720, 95th Cong., 1st Sess., reprinted in 1977 U.S.Code Cong. & Admin.News 3146, 3155 (emphasis added).

The Attorney General's position—his interpretation of the statute he is "charged with enforcing"—that the Act permits him to deal with transfer requests on an ad hoc basis is thus totally unfounded. Congress clearly intended that the Attorney General would grant such requests in almost all cases, and would promulgate regulations and guidelines to deal with those "unusual situation[s]" in which denial of such requests might be warranted. Furthermore, the Attorney General reproduced for this court a portion of the very provision of the Act's legislative history which clarifies that, although he retains discretion as to the *content* of such regulations, he does not with respect to his duty to *promulgate* them. Thus, there can be no doubt that the Attorney General is aware of his duty and has consciously chosen not to fulfill it.

Accordingly, this court finds a plain and peremptory duty on the part of the Attorney General to promulgate regulations, a duty sufficiently clear to invoke this court's mandamus jurisdiction. *Estate of Smith v. Heckler*, 747 F.2d 583 (10th Cir.1984) (mandamus was proper remedy to compel Secretary of Health and Human Resources to promulgate regulations where statute imposed a clear duty on her to do so); *see also Flynn v. Schultz*, 748 F.2d 1186,

1194 (7th Cir.1984), *cert. denied*, 474 U.S. 830, 106 S.Ct. 94, 88 L.Ed.2d 77 (1985).[5]

3. Adequacy of Alternative Remedies

The final element plaintiffs must satisfy to obtain mandamus relief is the requirement that there exist no adequate alternative remedies. The Attorney General does not argue that such alternative remedies are available, and this court can find none.

To be sure, plaintiffs can and, as discussed below, do challenge as an abuse of discretion the Attorney General's determination that they are not entitled to transfer. Thus, one could argue, plaintiffs have an alternative route available to them in challenging the Attorney General's decision.

Yet, this court's finding below that the Attorney General has indeed abused his discretion does not, and cannot " 'afford[ ] [plaintiffs] *full relief* as to the very subject matter in question.' " *Holmes v. United States Board of Parole*, 541 F.2d 1243 (7th Cir.1976) (emphasis added) (*quoting Carter v. Seamans*, 411 F.2d 767, 773 (5th Cir.1969)). The proper course for this court to follow in reversing the Attorney General's decision is to remand the case to the Attorney General for further action in accordance with this court's ruling. *Flynn v. Schultz*, 748

[5] "Mandamus may be used to compel the performance of a ministerial duty when the obligation to perform it is plainly defined. Further, 'it also is employed to compel action, when refused, in matters involving judgment or discretion, but not to direct the exercise of discretion in a particular way nor to direct the retraction of the reversal of action already taken in the exercise of either.' " *Flynn v. Schultz*, 748 F.2d at 1194 (*quoting Interstate Commerce Commission v. Humboldt Steamship*, 224 U.S. 474, 484, 32 S.Ct. 556, 559, 56 L.Ed. 849 (1952)) (other citations omitted).

F.2d 1186, 1194 (7th Cir.1984), *cert. denied*, 474 U.S. 830, 106 S.Ct. 94, 88 L.Ed.2d 77 (1985). Thus, unless this court also compels the Attorney General to promulgate regulations and guidelines to govern plaintiffs' requests, plaintiffs will again be forced to seek transfer to this country without the benefit of the generally-applicable regulations and rules which Congress clearly contemplated would guide the Attorney General in this and similar cases.

Accordingly, this court will issue a writ of mandamus ordering the Attorney General to promulgate regulations and guidelines to govern requests from American citizens and nationals incarcerated abroad for transfer to American prisons pursuant to the Convention and similar treaties.

Review of the Attorney General's Decision

The Administrative Procedure Act ("the APA") gives the federal courts the power to review final agency action unless federal "statutes preclude judicial review" or "agency action is committed to agency discretion by law." 5 U.S.C. § 701 *et seq.* The Attorney General "is an 'agency' subject to review jurisdiction under the APA." *Dellums v. Smith*, 573 F.Supp. 1489, 1498 (N.D.Cal.1983), *rev'd on other grounds*, 797 F.2d 817 (9th Cir.1986). Further, the Attorney General does not contest, and this court finds, that the Act neither specifically precludes judicial review of the Attorney General's decisions regarding prisoner transfer requests, nor commits these decisions to his sole and unreviewable discretion.

On the contrary, Congress made quite clear that the Attorney General's discretion with regard to prisoner transfer decisions should be carefully circumscribed. The Attorney General must grant such requests in all but the most "unusual situations," and must define by regulation

what those situations will involve. Implicit in this grant of authority is the recognition that, if the Attorney General abuses his discretion, courts will have the power to review, and if necessary reverse him. *See Turner v. United States Parole Commission*, 810 F.2d 612 (7th Cir.1987); *Alvarez v. Longboy*, 697 F.2d 1333 (9th Cir. 1983).

Thus, the APA review provisions govern plaintiffs' appeal of the Attorney General's decision to deny their requests for transfer. Section 10(e) of the APA, 5 U.S.C. § 706, informs this court's review:

> [T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of agency action. The reviewing court shall—
>
> . . . . .
>
> (2) hold unlawful and set aside agency action, findings and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .

Because the Attorney General acted without the guidance of regulations specifically required by the Act, his denial of plaintiffs' requests constitutes an abuse of discretion, and requires reversal, as a matter of law. *See Industrial Holographics, Inc. v. Donovan*, 722 F.2d 1362, 1367 & n. 9 (7th Cir.1983) (failure to promulgate and adhere to regulations can amount to arbitrary and capricious conduct because of the "danger of arbitrary action in the absence of articulated standards"); *cf. White v. Roughton*, 530 F.2d 750, 754 (7th Cir.1976) (failure of township supervisor to promulgate rules and regulations governing welfare eligibility violated due process because it placed "virtually unfettered discretion in [the supervisor] and his staff").

However, even if the Act did not specifically require that the Attorney General adopt regulations in carrying out his duties under the Act, this court would still be forced to reverse his decision here.

In denying plaintiffs' requests, the Attorney General necessarily determined that their request fell within Congress' contemplation of "unusual situation[s]" in which denial of transfer might be appropriate. The Attorney General points to several factors he employed in reaching this conclusion:

> (1) the relative seriousness of the offense for which plaintiffs are incarcerated;
>
> (2) plaintiffs' "extensive" criminal history;
>
> (3) the fact that plaintiffs will be immediately eligible for parole if transferred to an American prison; and
>
> (4) the unlikelihood that transfer would facilitate plaintiffs' rehabilitation.

Yet, as noted earlier, the Attorney General has not provided this court with any evidentiary material supporting these "findings", or indicated how they compare with other transfer request cases. The only cases available to this court for comparison are those few published opinions in which prisoners have been granted transfer back to America and then attacked, through habeas corpus, the legality of their incarceration here. While those cases are unlikely to constitute a representative sample of the Attorney General's decisions on transfer requests, this court notes that many of them involved crimes more serious than those for which plaintiffs are currently incarcerated.[6]

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[6] A letter from the American Consul, Embassy of the United States in London, to plaintiff Scalise, dated June 28, 1985, though

(Footnote continued on following page)

See, e.g., Tavarez v. U.S. Attorney General, 668 F.2d 805 (5th Cir.1982) (manslaughter); *Boyden v. Bell*, 631 F.2d 120 (9th Cir.1980) (smuggling heroin); *Kanasola v. Civiletti*, 630 F.2d 472 (6th Cir.1980) (murder); *Wilden v. Fields*, 510 F.Supp. 1295 (D.Wis.1981) (murder).

This is not to say that there are no circumstances in which an American convicted of armed robbery abroad can be denied transfer back to the United States. But in the absence of clearly articulated reasons and factual support for a denial, such a deviation from past practice compels this court to find the Attorney General's decision arbitrary and capricious, and an abuse of discretion in this case. *See West Chicago, Illinois v. United States Regulatory Commission*, 701 F.2d 632, 648 (7th Cir.1983) (where agency proceeds through informal adjudication, it must clearly state and support its reasons for its decision).

Because, as noted above, this court finds it appropriate to remand this case to the Attorney General for further proceedings consistent with this ruling, a few comments are appropriate on the Attorney General's application of the factors noted above to plaintiffs' requests.

To the extent that the Attorney General relied on the above factors to determine the danger that plaintiffs might pose to the American public if transfer were granted, he acted appropriately. Although Congress specified only the

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[6] *continued*
obviously not binding on the Attorney General, provides an interesting view of at least one American official regarding the sorts of "unusual situation[s]" in which an American's transfer request might be denied:

> [G]eneral policy for both the British and Americans is not to withhold consent for transfer except for extenuating circumstances; for example, *a mass murderer*. (Emphasis added).

seriousness of the crime for which the prisoner is incarcerated, and his eligibility for parole, as factors which could bring a case within the "unusual situations" in which transfer might be denied, *see* H.Rep. No. 95-720, 95th Cong., 1st Sess., *reprinted in* 1977 U.S.Code Cong. & Admin.News 3146, 3155, this court cannot say that the Attorney General abused his discretion in looking to other factors—i.e. plaintiffs' past criminal record—to determine plaintiffs' future threat.

In his arguments to this court, however, the Attorney General indicated that he also employed the above factors in reaching a determination that granting the transfer requests would contradict the Convention's salutory purpose of improving bilateral relations between transferring nations. Gov. Mem. at 5 ("[T]he transfer and possible parole of the plaintiffs would harm rather than enhance foreign relations between our countries."); *see also* H.Rep. No. 95-720, 95th Cong., 1st Sess., *reprinted in* 1977 U.S.Code Cong. & Admin.News 3146, 3148-49 (setting forth the three primary benefits of the Act: (1) increased probability or rehabilitation of offender; (2) improved bilateral relations between the transferring countries; (3) humanitarianism). This argument turns the Act and the Convention on their heads. Granting requests can improve bilateral relations; it cannot impair them. The host country always retains the right to decline a request for transfer and keep the prisoner in its own jails. Thus, to the extent the Attorney General rejected plaintiffs' request because he felt granting it would somehow impair relations between the United States and the United Kingdom, he clearly overstepped his discretion under the Act.

This Court also finds problems in the Attorney General's reference to the negligible rehabilitory benefits of bringing plaintiffs back to this country. The legislative histories

of the Act and the Convention clearly indicate that Congress and the President *presumed* that permitting an American incarcerated abroad to serve out his sentence in America would enhance the chance of rehabilitation. *See, e.g.*, H.Rep. No. 95-720, 95th Cong., 1st Sess., *reprinted in* 1977 U.S.Code Cong. & Admin.News 3146, 3149 ("Offender rehabilitation, which is one of the primary objectives of U.S. penal policy, *is facilitated* as a result of execution of penal sentences in an offenders home country.") (emphasis added). Nothing in these histories in any way suggests that the Attorney General may determine, on a case-by-case basis, whether he believes that transfer would serve such a function. Thus, the Attorney General also abused his discretion when he unilaterally made the determination that transfer would not facilitate rehabilitation, and then used this finding as a reason to deny plaintiffs' requests.

Procedural Due Process

The Constitution "prohibits the federal government from depriving a person of life, liberty, or property without due process of law." *Campbell v. Miller*, 787 F.2d 217, 222 (7th Cir.1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 673, 93 L.Ed.2d 724 (1987). Liberty interests can be found in the Constitution itself, in statutes, or in administrative regulations. However, once it is determined that such a protected interest exists, the Constitution alone prescribes the procedures the government must follow in the course of depriving a person of it. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985).

This court could find no authority, and the parties supplied none, on the liberty interests, if any, of American

citizens incarcerated abroad who seek transfer to the United States. Nevertheless, there appears no reason why they should be treated differently from Americans imprisoned in American jails who claim the right to be, or not to be, transferred from one prison to another. *Cf. Haig v. Agee*, 453 U.S. 280, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981) (American living in West Germany could challenge, under Due Process Clause, federal government's procedures in revoking his passport). And in those cases the law is quite clear: Where a statute or administrative regulation places limits on the discretion of administrative officials with regard to transfer decisions, a liberty interest arises and the Due Process Clause comes into play. *Mitchell v. Hicks*, 614 F.2d 1016 (5th Cir.1980); *see Olim v. Wakinekona*, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983) (prisoner had no due process right to remain in Hawaii where state placed no substantive limits on authority of state officials to transfer him to California or any other state).

This court has already discussed at length the limits the Act places on the Attorney General's discretion with regard to transfer requests. Americans incarcerated abroad thus have a legitimate expectation that their requests will be granted, subject only to exceptions which the Attorney General is authorized to prescribe. Thus, this court finds that the Act creates a liberty interest in these American citizens which the Attorney General can only deny through the procedures mandated by the Due Process Clause.

Of course, just what these procedures encompass is not an easy question. Not only is a pre-deprivation hearing impossible to guarantee, but a post-deprivation one may be as well. At a minimum, however, the Attorney General

should provide a prisoner whose request has been denied with both a specific explanation and elaboration of the grounds for his decision, and an opportunity to rebut them, *see Campbell v. Miller*, 787 F.2d at 224 ("The Supreme Court has repeatedly stated that procedural due process is a non-Euclidean concept critically related to time, place and circumstances."), either in writing or, where the prisoner desires, in person through a representative of his choosing.

In this case, the Attorney General responded to plaintiffs' requests with the single-paragraph letter reproduced above. This response leaves this court without meaningful basis for reviewing his decision. More importantly, however, it leaves plaintiffs, in prisons thousands of miles away, at a loss to understand why the government has condemned them to serve out their sentences in foreign jails when, as far as they can tell, Americans who have committed far more egregious crimes have been afforded the opportunity to serve their penance in their homeland. Such action on the part of the Attorney General falls short of even the limited procedural requirements to which plaintiffs are entitled.

Summary

This court has determined that the Attorney General has violated its duty under the Act to promulgate regulations setting forth standards and guidelines to govern the requests of Americans incarcerated abroad to be transferred to an American prison. This court has also found that the Attorney General acted arbitrarily and capriciously, and abused his discretion, in denying the request of the plaintiffs in this case. Finally, this court has concluded that the Attorney General deprived plaintiffs of due proc-

ess of law in denying their requests under the Act without a sufficient explanation and elaboration of his decision and without affording them an opportunity to rebut.

CONCLUSION

Accordingly, this court orders the Attorney General to promulgate regulations pursuant to its authority under the Act within a reasonable time. This court further orders the Attorney General, after the establishment of these regulations, to determine the eligibility of plaintiffs for transfer to America, to inform the plaintiffs of his decision, and, if negative, to afford the plaintiffs an opportunity to respond to this decision either in writing or, if plaintiffs choose, through personal representatives in this country.